No. 75-1514

In the Supreme Court of the United States

OCTOBER TERM, 1975

BERNARD M. PESKIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY

THOMAS P. SULLIVAN
CAROL R. THIGPEN
Attorneys for petitioner
Bernard M. Peskin

Of Counsel:
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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REPLY BRIEF TO BRIEF OF THE UNITED STATES IN OPPOSITION

I.

A COMBINATION OF ERRONEOUS EVIDENTIARY RULINGS, JURY INSTRUCTIONS, AND COERCION OF THE JURY'S VERDICT DEPRIVED PETITIONER OF FUNDAMENTAL CONSTITUTIONAL RIGHTS.

[Govt. Brief, pp. 9-16]

In its brief in opposition, the government has ignored the devastating collective effect of the erroneous and in-

consistent rulings of the trial judge, the instructions given to the jury, and the trial judge's remarks to the jury after two and a half days of deliberation. We believe that each individual error requires a new trial; when viewed together, the effect of the trial judge's errors was so fundamentally unfair that petitioner was deprived of all semblance of due process of law. Particularly in light of the cumulative impact of these errors, which effectively precluded petitioner from presenting his defense, this Court should exercise its supervisory powers and reverse petitioner's conviction.

A.

[Govt. Brief, Part 2a, pp. 9-11.]

In its answer to petitioner's contention that he should have been allowed to cross-examine village officials about their prior and contemporaneous illegal acts of extortion, the government has ignored the central point. The government argues that "details" relating to instances in which village officials received money for votes in other zoning cases are unimportant for purposes of impeaching the credibility of the village officials. Petitioner did not offer this evidence primarily for the purpose of impeaching the credibility of the village officials, although this was a secondary and valid reason for the admission of the evidence.

Petitioner offered testimony relating to prior extortions by the village officials, petitioner's accusers, primarily to demonstrate the likelihood that money was extorted from petitioner, and hence he was not guilty of bribery under Illinois law as charged in the indictment. The proof went to the heart of the charge and petitioner's defense to the charge. Thus, during a discussion in chambers, the trial judge stated that petitioner's intent when he paid Mayor

Jenkins was "really the fundamental issue in the case, and virtually the only issue in the case." (Tr. 1526-27.) The trial judge himself recognized the relevance of who first brought up the question of payment of money. The judge gave the instruction (quoted at page 13 of the government's brief) that "in determining whether the defendant was a victim of extortion, such as to negate his alleged criminal intent to bribe, it is relevant, but not controlling, whether petitioner or Jenkins first raised the question of money." But while the trial judge recognized the relevance of this question, he virtually foreclosed petitioner from demonstrating to the jury the likelihood that Jenkins first proposed the idea of a pay-off. Petitioner's attorney was allowed to ask each trustee-witness only the single question of whether he had ever received money for a vote before. He was not allowed to advise the jury of the number of occasions or the circumstances or the instigator of the previous payments.

Contrary to the impression left with the jury, the FBI statements of the trustee-witnesses showed a systematic and pervasive pattern of extortion which existed prior to and contemporaneously with the payment in this case. (See Defendant's Offer of Proof, filed March 28, 1974.)

We strongly urge this Court to read Defendant's Offer of Proof, which was impounded by the trial court because of the sensitive material it contains. This offer of proof, complete with verifying statements of the trustee-witnesses to FBI agents, details incident after incident of cash payments, as well as the formation of three corporations through which contracts and money were funnelled to village officials in the elaborate and sophisticated extortion scheme existing in Hoffman Estates long before and at the time of the payment in this case. The same village officials who were petitioner's accusers at trial

were receiving so many pay-offs from so many different builders around the time of the payment in this case that they had difficulty keeping the payments and amounts straight. (Offer of Proof, 5, 9; Exs. 3, 7.) One trustee aptly capsulized the climate in Hoffman Estates around 1968 when he was asked by a government investigator whether he received money for a particular rezoning; he replied that he did not recall, but since they already had that same builder paying for two other rezonings, they "certainly would not have let him go free for this one." (Offer of Proof, Ex. 3.)

The jury learned nothing of the trustees' pattern of extortion; rather, they heard former Mayor Jenkins—the mastermind of the sophisticated extortion program which had been rampant in Hoffman Estates for years before petitioner arrived on the scene—claim he was "shocked" when petitioner mentioned money to him (Tr. 726). The jury was told only that the trustee-witnesses had, at some other unspecified time, received an unspecified amount from some unidentified source in exchange for a vote on an unidentified issue. It is ironic that the trial judge instructed the jury that it was relevant to determine who first brought up the question of money, for he almost completely precluded petitioner from adducing any evidence on this "relevant" question.

In its brief, the government states that the trial judge declined to allow "a sweeping inquiry into all the details of former transactions." In discussions with the judge, and in the offer of proof, petitioner fruitlessly offered to limit his inquiry in any reasonable manner which the trial judge might designate. (Tr. 1374; Defendant's Offer of Proof at 17.)

The government also states (at p. 11) that petitioner was not a principal of Kaufman & Broad ("K&B"), and

thus had no interest that could have been subject to an effective extortion threat. The government overlooks that petitioner was to receive a finder's fee in the event that the sale of the land in Hoffman Estates, which was contingent upon rezoning, was consummated. (Tr. 16.) Threat of loss of this income is sufficient to support a finding of extortion. *United States* v. *Staszuk,* 502 F.2d 875, 877-78 (7th Cir. 1974), *modified,* 517 F.2d 53 (7th Cir. 1975); *United States* v. *Addonizio,* 451 F.2d 49, 59 (3d Cir. 1972), *cert. denied,* 405 U.S. 936; *United States* v. *Hyde,* 448 F.2d 815, 833 (5th Cir. 1971), *cert. denied,* 404 U.S. 1058; *United States* v. *Sopher,* 362 F.2d 523, 527 (7th Cir. 1966).

The government also argues that petitioner could not have had his will overborn and thus been subject to coercion because he did not know of the prior extortions. This argument does not square with the facts—petitioner was aware of prior extortions and so informed his client Stulberg (Tr. 235-237). Aside from this, however, under the trial judge's instruction that it was relevant who first brought up the subject of money, it does not matter whether petitioner was aware of the prior extortions. Evidence of the prior extortions by the village officials tends to support petitioner's claim that Jenkins and his fellow trustees were the instigators in this case, and is thus relevant on the issue of intent. See *United States* v. *Barash,* 365 F.2d 395, 401-02 (2d Cir. 1966). *Cf. Griffin* v. *United States,* 336 U.S. 704, 718 (1949); *Griffin* v. *United States,* 183 F.2d 990, 992 (D.C. Cir. 1950); *Campbell* v. *Illinois,* 16 Ill. 16, 17 (1854).

B.

[Govt. Brief, Part 2b, pp. 11-12.]

The government states that the record shows petitioner offered money to a public official on another occasion. The record does not show this. Rather, there was a discussion

in chambers indicating that if petitioner testified on his own behalf the trial judge would allow certain material to be opened up under cross-examination or in rebuttal relating to a conversation which occurred more than two years after the Hoffman Estates matter. There is no direct testimony by any witness on this subject.

In its brief, the government further obscures the fact that the incident occurred more than two years *after* the incident involved in this case, and did not involve Hoffman Estates. In *United States* v. *Koska,* 443 F.2d 1167, 1169 (2d Cir. 1971), *cert. denied,* 404 U.S. 852—the only case upon which the government relies (Br. p. 12)—the evidence related to a *prior* incident. Moreover, the government ignores the settled principle that the trial judge is required to weigh the probative value against the prejudicial effect of evidence concerning the other incident. It was fundamentally unfair for the trial judge to rule that petitioner could be questioned about a single incident which occurred two and one-half years after the K&B rezoning in Hoffman Estates, but refuse to permit petitioner's accusers to be asked about their numerous extortions from other Hoffman Estates builders just before and at the same time as the K&B rezoning.

C.

[Govt. Brief, Parts 2c-d, pp. 12-14]

The government contends that the instructions which petitioner claims shifted the burden of proof to him were not erroneous, citing *Cupp* v. *Naughton,* 414 U.S. 141, 147 (1973). The facts in *Cupp* distinguish that case from petitioner's case. In *Cupp,* an instruction was given stating that every witness is presumed to speak the truth, but that presumption may be overcome by other factors, such as the manner in which the witness testifies, the nature of

the testimony, evidence affecting his or her character, interests, or motives, by contradictory evidence, or by a presumption. That instruction has no relation to the instructions at issue here.

Regarding the tax instruction, the trial court stated that "unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find from the defendant's signature at the bottom of his return that he had knowledge of the contents of that return." The presumption created by this instruction can only be rebutted by the defendant's testimony that he did not know the contents of his return. Thus, this instruction creates an intolerable tension for a defendant, who is forced either to relinquish his constitutional right not to testify, or to allow the jury to accept the conclusion that his signature proves his knowledge. The instruction was particularly devastating in this case, because petitioner desired to testify on his own behalf but could not because of the trial judge's erroneous ruling about cross-examination discussed in Part B above.

Similarly, in regard to the extortion instruction, the statement that, unless the extortion is so "overpowering" as to negate criminal intent, then extortion is not a total defense to bribery charges shifts the burden of proof to the defendant. Petitioner was prevented from testifying himself *and* was prevented by the trial judge's ruling from eliciting testimony from the trustees which would have tended to show the overpowering effect of the extortion on petitioner.

The government contends that the tax instruction was given in relation to the personal tax evasion count upon which petitioner was found not guilty (Count 15), and not the false partnership return filing charge

upon which defendant was convicted (Count 16). There is nothing in the instruction itself or in the record which indicates that the jury was to limit its consideration of this instruction to the tax evasion count. In fact, the wording of the instruction indicates that it is to be applied to any tax return, and thus the jury could not be expected to distinguish between the counts in applying this instruction.

D.

[Govt. Brief, Part 2e, pp. 14-16.]

In light of the seriousness of the other errors committed by the trial court, it is difficult to understand how coercing a verdict from the jury can be said to be harmless error. It surely cannot be said beyond a reasonable doubt that the court-ordered 30-minute cutoff in this case had no effect on the verdict. *Chapman* v. *California,* 386 U.S. 18, 24 (1967).

II.

THE TRAVEL ACT CHARGES ARE INSUFFICIENT TO SUPPORT FEDERAL JURISDICTION.

[Govt. Brief, Part 1a, pp. 6-8.]

The government's own attempts to distinguish Seventh Circuit cases relating to the Travel Act supports petitioner's position. The government states that the plan to shift funds interstate was known to K&B, petitioner's alleged co-conspirator, and therefore petitioner is chargeable with that knowledge. However, knowledge is not the issue involved in this point of law. In *United States* v. *Altobella,* 442 F.2d 310, 313-15 (7th Cir. 1971), the defendants knew that their extortion victim planned to cash a

check in order to obtain cash; they knew that the victim was from out of state and therefore that his check probably would be drawn on an out-of-state bank. The Court of Appeals held that the Travel Act required a more significant use of a facility of interstate commerce in aid of the defendants' unlawful activities, and the use of the mails by the bank through which the victim's check cleared was incidental to the scheme. See also *United States* v. *Isaacs,* 493 F.2d 1124, 1146-49 (7th Cir. 1974), *cert. denied,* 417 U.S. 976; *United States* v. *McCormick,* 442 F.2d 316, 318 (7th Cir. 1971).

In the present case, K&B's way of handling intercorporate funds was even more incidental to the alleged bribery plan than the interstate activity in *Altobella* or in *Isaacs.* The K&B inter-company transfers were not involved in the plan to pay or the payment to the trustees. The intercorporate transfers of funds were fortuitous, remote, and immaterial to the alleged bribe.

The fifth Travel Act count (Count 5) should be reversed because it is based upon a single trip by Stulberg which was not attributable to or caused by petitioner and which (as Counts 6-9) was incidental and immaterial to the alleged crime. The charge that petitioner conspired to violate the Travel Act (Count 1) should logically fall with the substantive counts.

B.

[Govt. Brief, Part 1b, pp. 8-9.]

The government argues that our contention that there were no illegal activities after the intercorporate transfers is relevant only to Count 9. The government ignores *United States* v. *Zemater,* 501 F.2d 540, 544 (7th Cir. 1974), in which the Court below held that the sequence of

the use of interstate facilities and the violation of state law is jurisdictional, and that under 18 U.S.C. §1952 the activity which comes after the use of interstate facilities must constitute a violation of the law of the jurisdiction in which the activity occurred. In the present case then, the activity must violate the Illinois bribery statute. Under Illinois law, the crime of bribery consists of promising, tendering, receiving or agreeing to accept consideration in violation of the provisions of the statute. No consideration was promised, tendered, received or agreed to after the transfers of funds alleged in Counts 6 through 9.* Thus, no act constituting bribery in violation of Illinois law was performed after the intercorporate transfers of funds alleged in any of those counts.

III.

EVIDENCE GATHERED BY THE INTERNAL REVENUE SERVICE BY TRICKERY AND FRAUD SHOULD HAVE BEEN SUPPRESSED.

[Govt. Brief, Part 3, p. 16.]

The government states that under *Beckwith* v. *United States,* No. 74-1243, decided April 21, 1976, petitioner was not entitled to *Miranda* warnings when he furnished information to Internal Revenue Service agents conducting an audit of his tax returns. However, the government does not discuss the alternative bases espoused by petitioner indicating why the evidence gathered by the Internal Revenue Service should have been suppressed in his case. As set forth in our petition, we contend that it should

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* The reimbursement of petitioner by K&B did not and could not violate or facilitate a violation of the Illinois bribery statute, and thus cannot furnish the requisite jurisdictional base for conviction under the Travel Act. (Ch. 38, §33-1, Ill. Rev. Stat. 1967.)

be suppressed because of the fraud and trickery engaged in by the Internal Revenue Service in conducting a purported civil audit which was in reality a subterfuge for a criminal investigation. The facts supporting this inference are set forth in detail in Appendix 5 to petitioner's petition for a writ of certiorari. This is an issue of great importance that was not reached in *Beckwith,* which should be considered by this Court.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that this Court grant a writ of certiorari to review the judgment of the Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

THOMAS P. SULLIVAN
CAROL R. THIGPEN
Attorneys for petitioner
Bernard M. Peskin

Of Counsel:
JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611
(312) 222-9350

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V.

Bd. of Fire and Police Comm'rs., Etc.